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In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
Mayer, Brown, Rowe & Maw LLP
1909 K St., N.W.
Washington, D.C. 20006
(202) 263-3000

THEODORE B. OLSON
MARK A. PERRY
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
BRIAN M. WILLEN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner Philip Morris USA Inc.
(Additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

STUART ALTSCHULER
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

JOSEPH PATRICK ARCHIE
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104
(215) 994 4000

DAVID S. EGGERT
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner Philip Morris USA Inc.

DAVID L. ROSS
ELLIOT H. SCHERKER
Greenberg Traurig
1221 Brickell Ave.
Miami, FL 33131
(305) 579-0500

Counsel for Petitioner Lorillard Tobacco Co.

DONALD B. AYER
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

CHARLES R.A. MORSE
Jones Day
222 E. 41st Street
New York, NY 10017
(212) 326-7847

Counsel for Petitioner R.J. Reynolds Tobacco Co.

AARON H. MARKS
LEONARD A. FEIWUS
Kasowitz Benson Torres & Friedman
1633 Broadway, 22nd Floor
New York, NY 10019
(212) 506-1700

KELLY ANNE LUTHER
Clark Silverglate & Campbell, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
(305) 377-0700

Counsel for Petitioner Liggett Group LLC

RICHARD A. SCHNEIDER
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 572-4600

Counsel for Petitioner Brown & Williamson Holdings, Inc.

JAMES A. GOOLD
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel for Petitioner The Tobacco Institute, Inc.

QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct.

2. Whether, merely by invoking characterizations such as "fraud" or "negligence," a plaintiff may evade federal preemption under this Court's ruling in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which holds that the Federal Cigarette Labeling and Advertising Act preempts state-law liability based, *inter alia*, on allegations that cigarette manufacturers failed to warn about the dangers of smoking or marketed cigarettes in ways that "neutralized" the federally mandated warnings.

RULE 14.1(b) AND 29.6 STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. Altria Group, Inc. is a publicly held company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation. Before August 2, 2004, Petitioner was known as Brown & Williamson Tobacco Corporation. On July 30, 2004, a transaction was completed whereby Petitioner R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business.

Petitioner R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of Reynolds American Inc., a publicly traded corporation. Petitioner Brown & Williamson Holdings, Inc. owns approximately 42% of the common stock of Reynolds American Inc. As noted above, Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Petitioner Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued

bonds that are publicly owned. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Petitioner Liggett Group LLC ("Liggett"), formerly known and sued in this matter as Liggett Group Inc. and Brooke Group Holding Inc., is a Delaware limited liability company. Vector Group Ltd. indirectly owns 100% of the interest in Liggett. Vector Group Ltd. is publicly traded on the New York Stock Exchange. No publicly held company owns 10% or more of Vector Group Ltd.'s stock.

Petitioner The Tobacco Institute, Inc. is a dissolved not-for-profit corporation organized under New York law. During its existence The Tobacco Institute, Inc. did not issue stock and had no parent corporation. In addition, since its dissolution, The Tobacco Institute, Inc. has not issued stock and has had no parent corporation.

Petitioner The Council for Tobacco Research U.S.A., Inc. is a dissolved New York not-for-profit corporation. It was dissolved pursuant to the New York Not-for-Profit Corporation Law on November 6, 1998. Prior to its dissolution, it had no parent companies, subsidiaries, affiliates, or stockholders.

The other parties to the proceeding in the Florida Supreme Court, respondents here, were Frank Amodeo, Robert W. Angell, Ralph Della Vecchia (as Personal Representative of the Estate of Angie Della Vecchia), Howard A. Engle, Mary Farnan, Raymond Lacey, Loren E. Lowery, Michael Mayti, and Frosene D. Steevens.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida (App. A, *infra*) is reported at 945 So. 2d 1246. The opinion of the Third District Court of Appeal (App. B, *infra*) is reported at 853 So. 2d 434. The relevant order of the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County (App. C, *infra*) is reported at 2000 WL 33534572.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on July 6, 2006. That court issued a slightly revised opinion on December 21, 2006, but otherwise denied petitioners' request for rehearing. On March 19, 2007, Justice Thomas extended the time to petition for certiorari to May 20, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). This case began as a massive class action for personal injuries allegedly suffered by more than 700,000 cigarette smokers. It is the first smokers' class action to be tried to judgment. Despite recognizing that the class had to be decertified, the Florida Supreme Court issued an unprecedented ruling that certain vague jury findings from the class trial are to have "res judicata effect" in new suits brought by individual members of the former class. This petition raises two questions concerning that judgment: whether the decision to give preclusive effect to the generalized jury findings violated due process; and whether the verdicts, both classwide and in favor of two individual respondents whose claims were fully tried, were barred by federal preemption.

The Florida Supreme Court's ruling terminates this case, but for the possibility that those two individuals may elect to seek punitive damages on remand. The preclusion ruling, which is the subject of the due process challenge, has no ef-

fect on those two individuals and thus is final for purposes of Section 1257 no matter what they elect to do.

As for federal preemption, this Court has jurisdiction because that issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). Any subsequent hearing on individual punitive damages claims could not "foreclose or make unnecessary" a ruling on the preemption issue. *Id.* Jurisdiction under Section 1257 thus is appropriate because, like the accounting in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-25 (1945), the further state-court proceedings in this case would decide nothing but the final sum of money that will be awarded to the two individuals. See also, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963) (jurisdiction existed over due process challenge to a criminal conviction even though defendant's sentence had not yet been finally determined).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 1334(b) provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

STATEMENT

This case arises out of an enormous class action involving what plaintiffs estimated to be 700,000 citizens and residents of Florida who suffered or are suffering from illnesses caused by their addiction to cigarettes. The Florida Supreme Court upheld multimillion-dollar compensatory awards to two individual plaintiffs, but recognized that class action treatment was inappropriate and ordered the class decertified. Nonetheless, adopting what it termed a "pragmatic solution," the court announced on its own initiative that certain highly generalized findings made by the jury regarding unspecified

acts by petitioners over a 50-year period would have "res judicata effect" in individual suits by former class members.

Two fundamental defects plague this ruling and, if not addressed by this Court, will contaminate all cases filed by individual class members. First, the ruling conflicts with long-standing and universally accepted limitations on the use of issue preclusion – limitations that this Court has held to be required by due process. The findings to which the Florida Supreme Court has given preclusive effect were the product of a sprawling, year-long trial that touched upon myriad aspects of five separate defendants' conduct in designing, manufacturing, and marketing cigarettes over half a century. The resulting verdicts give no indication which of respondents' numerous and varied allegations of wrongful conduct the jury credited. Instead, the jury returned a set of abstract and generalized findings – for example, that petitioners "were negligent" and that they sold cigarettes that "were defective." Thus, although the jury found that petitioners engaged in wrongful conduct, its findings do not reveal what petitioners did wrong.

Yet the Florida Supreme Court has directed that those generalized findings be treated as preclusive in all follow-on litigation. As judges and juries throughout Florida attempt to implement the Florida Supreme Court's mandate in new cases, they will be called upon to make unfounded guesses about what the jury's findings mean. Giving res judicata effect to these findings violates a basic due process rule announced over a century ago: Where evidence "was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment," that verdict or judgment cannot be taken as "an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail." *Fayerweather* v. *Ritch*, 195 U.S. 276, 307 (1904).

Moreover, the Florida Supreme Court's decision is emblematic of the tendency of some courts to use the tools of

aggregation to push the adjudication of mass tort claims beyond previously recognized boundaries in the name of efficiency. If not corrected, the decision below will generate a series of artificial "trials" in which key aspects of plaintiffs' proof and defendants' defenses will be reduced to a charade. Certiorari is warranted to make clear that state courts may not sacrifice long-standing protections of the right to a full and fair trial merely because they find it "pragmatic" to do so. The time for review is now, before petitioners and the courts are subjected to the substantial burdens of those constitutionally impermissible proceedings.

Second, both the generalized jury findings and the individual damages awards rest on evidence, arguments, and theories of liability that are preempted by federal law. In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act") expressly preempts claims (1) that cigarette manufacturers failed to warn the public about the health effects of smoking or (2) that manufacturers, through advertising or promotion, "neutralized" the effect of the federally mandated labels that explicitly warn the public about those health effects. In this case, respondents advanced just such failure-to-warn and neutralization claims. Nevertheless, petitioners' preemption objections were overruled on the theory that *Cipollone* does not require preemption of such claims when labeled as "fraud" claims or treated as falling within other traditional causes of actions such as "negligence."

This case thus illustrates the substantial uncertainties that have divided the lower courts over the proper interpretation of *Cipollone*. Because of the recurring and central nature of this issue in tobacco litigation, there is a pressing need for this Court to dispel the confusion created by its fractured decision in *Cipollone* by making clear that concealment and neutralization claims are preempted, however they are la-

beled. Review of this issue is also warranted because the rejection of petitioners' preemption defense, coupled with the Florida Supreme Court's preclusion holding, sets the stage for findings resting on preempted theories to be given effect in cases brought by former class members across the State. Deferring review would allow error to be injected into potentially every one of those cases, creating a mess that would take years to clean up, with a monumental waste of resources in the meantime.

1. This case began in May 1994, when six individuals filed a class action complaint in the Florida Circuit Court for Miami-Dade County seeking damages from petitioners, the major domestic cigarette companies, for injuries allegedly caused by smoking. App., *infra*, 69a-70a. They sought hundreds of billions of dollars in compensatory and punitive damages. *Id.* at 74a. A class was ultimately certified consisting of an estimated 700,000 Floridians (and their survivors) "who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 6a.

Over petitioners' objections, the trial court implemented a multi-phased trial plan. Phase I consisted of a year-long trial of asserted "common issues" relating to petitioners' conduct and the general health effects of cigarette smoking. App., *infra*, 6a. During this phase, respondents presented evidence of many different kinds of alleged misconduct occurring over more than five decades. Asserting negligence and product defect, for instance, respondents advanced hundreds of different allegations relating to the design, manufacture, and marketing by different petitioners of a wide array of cigarette brands. Similarly, asserting fraud and breach of express warranty, respondents introduced thousands of communications – from tobacco advertisements and promotional materials to public statements by tobacco companies – that

allegedly concealed material information or made various false representations.[1]

None of this evidence was linked to the circumstances of any identifiable class member. See T.36358-59; T.36445; T.36746. In allowing this agglomeration of diverse evidence of petitioners' actions – none of which could possibly have affected all class members, and only a small fraction of which would have been admissible in any individual's case – the court effectively permitted respondents to try the case as though the class consisted of a fictional composite plaintiff who smoked every cigarette brand; saw, heard, and relied upon every tobacco advertisement; and developed every possible smoking-related injury. The prejudice inherent in this procedure was compounded by the misconduct of respondents' trial counsel, who likened petitioners' activities to the horrors of slavery and the Holocaust, repeatedly engaged in racial pandering before the predominantly African-American jury, and expressly invited the jury to disregard the law.[2]

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[1] See, *e.g.*, T.11202 (testimony concerning the "Frank Statement" of 1954); T.12879-82 (testimony concerning a presentation focusing on 65-70 different tobacco advertisements, including ads for Camel cigarettes, Chesterfields, and Virginia Slims); T.16385-86 (introduction of Joe Camel ads from *Rolling Stone* magazine, discussion of *Sports Illustrated* cigarette promotions and product placements in various films); T.18695-98 (testimony concerning how various magazines refused to publish information about the health effect of cigarettes out of concern about losing advertising revenue); T.18983-89 (testimony concerning advertising from the 1930s and 1940s involving doctors' endorsement of cigarettes).

[2] See, *e.g.*, T.36348 ("You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the holocaust? * * * What is the other side to slavery?"); T.36490 ("The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s."); T.36371 ("[Defendants say:] It's a legal product. It's a legal product. Legal don't make it right.").

Not only did respondents present multiple, alternative theories of wrongdoing in support of each of their legal claims, and seek to substantiate their theories with a blizzard of different acts and omissions, but they proposed a verdict form that asked nothing more than highly generalized questions about defendants' conduct. App., *infra*, 192a-206a. Petitioners objected (R.215: 49493-49532), arguing that, if the Phase I verdicts were to be used by new juries in future proceedings, the verdict form had to be sufficiently detailed to identify the factual content of and basis for the jury's ultimate findings. The trial court rejected petitioners' objection and adopted respondents' generalized form. T.35893-95; T.35952-54.

Accordingly, the jury's findings are remarkably abstract. The jury found, *inter alia*, that petitioners:

- "placed cigarettes on the market that were defective and unreasonably dangerous";
- "made a false or misleading statement of material fact with the intention of misleading smokers";
- "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both";
- "sold or supplied cigarettes that were defective";
- "were negligent"; and
- sold or supplied cigarettes that "did not conform to representations of fact" made by petitioners.

App., *infra*, 6a-7a, 192a-206a.[3] It is impossible to ascertain from these findings which of the various designs of petition-

[3] Petitioners do not challenge giving preclusive effect to two sufficiently specific causation findings: that smoking causes certain enumerated dis-

ers' hundreds of cigarette brands were defective, in what ways they were defective, what facts were concealed or by whom, which cigarettes failed to conform to which representations, or how petitioners had acted negligently.

In Phase II-A, the same jury heard evidence relating to three individual smokers hand-picked by respondents' counsel: Frank Amodeo, Angie Della Vecchia, and Mary Farnan. App., *infra*, 7a. It determined that certain (again unspecified) conduct found wrongful in Phase I caused injury to those individuals, awarding compensatory damages totaling $12.7 million. In Phase II-B, the jury awarded a lump sum of $145 *billion* in punitive damages.

2. Throughout Phases I and II, respondents were allowed to adduce evidence and arguments relating directly to contentions that petitioners submit were expressly preempted by the Labeling Act. In particular, respondents claimed that (1) petitioners concealed information or failed to provide adequate warnings about the health risks of smoking and (2) petitioners' advertising "neutralized" the federally mandated warning labels. See *infra*, II.A. When petitioners objected, the court expressed contempt for the very idea of federal preemption, saying that it "[b]oils my blood and boggles my mind" and suggesting that preemption "doesn't apply to modern science and what's happening today." T.16621-22.

At the close of Phase I, petitioners proposed an instruction to make clear to the jury that it could not base liability on preempted theories, including concealment and "neutralization." App., *infra*, 190a-191a. The trial court rejected petitioners' proposal. The instruction given by the court said nothing about "neutralization" and, although it stated that respondents' claims could not be based on a mere failure to warn after 1969 (when Labeling Act preemption took effect),

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eases; and that cigarettes containing nicotine are addictive or dependence producing. App., *infra*, 6a, 193a-194a.

it advised the jury – incorrectly – that "federal law does not limit the liability of any defendant for claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70.

Following the Phase II-B verdict, petitioners moved, *inter alia*, for class decertification, remittitur, and judgment as a matter of law. The trial court denied these motions. App., *infra*, 127a-186a. Rejecting petitioners' preemption arguments, the court held that federal law "certainly does not preempt any acts of fraud or conspiracy committed by the defendants subsequent to 1969." *Id.* at 138a. The court entered a final judgment ordering petitioners immediately to pay (1) the compensatory damages awarded to the three individual plaintiffs whose claims were tried in Phase II-A and (2) the $145 billion punitive damages award. *Id.* at 183a-185a.

3. The Florida Third District Court of Appeal reversed the judgment in its entirety and ordered the class decertified. App., *infra*, 68a-126a. Citing the extensive body of case law refusing to certify smokers' claims as class actions (*id.* at 75a-77a), the court held that "this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment" (*id.* at 87a). Indeed, "each class member had unique and different experiences that will require the litigation of substantially separate issues." *Id.* at 81a. The court also concluded that the $145 billion punitive damages award was excessive. *Id.* at 99a-103a. In addition, it held that reversal was required due to the "inherent[ly] inflammatory" jury nullification arguments and racial pandering of respondents' counsel, which "deprived the defendants of due process and a fair trial." *Id.* at 117a-118a. Having reversed on these grounds, the court did not address petitioners' other assignments of error, including Labeling Act preemption.

4. On July 6, 2006, a divided Florida Supreme Court overturned much of the Court of Appeal's decision. App., *infra*, 1a-67a. It unanimously upheld the vacatur of the mas-

sive punitive damages award (App., *infra*, 2a), but a narrow majority concluded, with no analysis, that the "trial court did not abuse its discretion in certifying the class" (*id.* at 27a).[4] The Supreme Court agreed with the Court of Appeal that the predominance of individual issues and "problems with the three-phase trial plan negate the continued viability of this class action." *Id.* at 27a. Nevertheless, it opted for what it termed the "pragmatic solution" of decertifying the class only *prospectively* (*id.* at 30a-31a), invoking, on its own initiative (without briefing or argument) Florida's equivalent of Fed. R. Civ. P. 23(c)(4)(A) to preserve the jury's Phase I findings on various issues (*id.* at 27a-30a).[5] The court ruled that those findings "will have res judicata effect" in new actions to be filed against petitioners by members of the decertified class. *Id.* at 31a. (Class members were given until January 2008 to file their individual cases. *Id.*) Finally, the court reinstated the awards to Farnan and Della Vecchia. *Id.* at 39a-43a.

In dissent, Justice Wells identified the fundamental flaws in the majority's "harmful and confusing" decision. App., *infra*, 57a. The dissent argued that the constitutional defects in both the original trial plan and the majority's "pragmatic so-

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[4] The majority also concluded that the "inappropriate" arguments of respondents' counsel – while "ventur[ing] very close to the line of reversible error" – did not warrant reversal. App., *infra*, 33a. In the course of addressing this issue, the majority made a fleeting reference to preemption, asserting that "[a]lthough compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I." *Id.* at 38a.

[5] All Phase I findings were preserved except (1) the findings relating to fraud by affirmative misrepresentation and intentional infliction of emotional distress, which the court acknowledged "involved highly individualized determinations"; and (2) the finding that petitioners engaged in conduct that "would permit a potential award or entitlement to punitive damages." App., *infra*, 31a. The Florida Supreme Court offered no basis for distinguishing other equally individualized determinations, such as the fraudulent concealment and express warranty findings.

lution" required decertification of the class in its entirety and invalidation of all the Phase I findings.

5. Petitioners moved for rehearing, contending, *inter alia*, that the "res judicata" holding violated due process and that the preemption issue required resolution. Respondents' Motion for Rehearing in the Florida Supreme Court (August 7, 2006).[6] Petitioners asked the Florida Supreme Court to vacate the generalized Phase I findings challenged here and to clarify that the Court of Appeal should decide the preemption issue on remand. *Id.* at 30. While slightly altering its original opinion, the Florida Supreme Court denied rehearing without addressing petitioners' due process argument or their request for clarification of the status of preemption. App., *infra*, 187a-189a. On remand, petitioners asked the Court of Appeal to resolve the various issues – including preemption – that had not yet been addressed on appeal. That request was denied without comment. The Florida appellate courts thus have definitively upheld Farnan's and Della Vecchia's compensatory damages awards – and set the stage for significant follow-on litigation – while ignoring petitioners' repeated arguments that respondents' claims are preempted.

[6] In their original briefing, petitioners had pointed out to the Florida Supreme Court that preemption was an independent basis for affirming the Court of Appeal's decision and contended that it would need to be addressed if that decision were reversed. Brief On The Merits Of All Respondents Other Than Liggett And Brooke (July 16, 2004) at 40.

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA SUPREME COURT HAS ABANDONED A FUNDAMENTAL DUE PROCESS LIMITATION ON THE USE OF PRECLUSION.

A. Due Process Prohibits Giving Preclusive Effect To Verdicts That Are Too General To Reveal The Actual Facts That Were Found.

A decade ago, this Court unanimously observed that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). The Court struck down one such extreme application in *Richards* and another in *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160, 168 (1999). See also *Hansberry* v. *Lee*, 311 U.S. 32, 40-46 (1940). The Court's rejections of extreme applications of preclusion are specific instances of the general principle that "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994); see also *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 457 (1993).

The preclusion ruling here runs afoul of just such limitations by abandoning the deeply rooted principle that a determination in an earlier proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment." *De Sollar* v. *Hanscome*, 158 U.S. 216, 221 (1895). This rule was entrenched in English law no later than 1628, when Sir Edward Coke noted that "[e]very estoppell * * * must be certaine to every intent, and [is] not to be taken by argument or inference." 2 COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY ON LITTLETON ¶ 352a (London, W. Clarke 1817); see also *The Duchess of*

Kingston's Case, 20 Howell's State Trials 538 (House of Lords 1776) (preclusion requires a determination "directly upon the point" and may not be applied to any finding that can only "be inferred by argument"), quoted in 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 697–698 (10th ed. 1860).

By the time of the Fourteenth Amendment, American courts had uniformly adopted the rule that a party cannot be precluded from litigating an issue in a subsequent case unless the issue has been specifically and ascertainably decided in prior litigation. See, *e.g.*, *Cecil* v. *Cecil*, 19 Md. 72, 1862 WL 2345, at *5 (1862); *Sawyer* v. *Woodbury*, 7 Gray 499, 502-04 (Mass. 1856) (Shaw, C.J.); WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 173 (1878). This Court has repeatedly embraced this fundamental limitation on issue preclusion, consistently refusing to recognize an estoppel where the generality of the verdict or judgment made the underlying findings uncertain. See, *e.g.*, *Russell* v. *Place*, 94 U.S. 606, 608 (1876) (preclusion is unavailable "if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered"); *Cromwell* v. *Sac County*, 94 U.S. 351, 353 (1876) (in applying preclusion the question "must always be" what was "actually litigated and determined in the original action, not what might have been thus litigated and determined").

In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), the Court again addressed whether a judgment may be given preclusive effect if it cannot be determined whether the issue on which preclusion is sought was actually decided in the prior litigation. As was necessary to its assertion of jurisdiction under the applicable statute, the Court held that abrogating this limitation on the use of preclusion raised an issue of constitutional dimension. *Id.* at 297-99. Precluding the litigation of issues under those circumstances "is not to be consid-

ered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure." *Id.* at 297. *Fayerweather* thus established (*id.* at 307), as a matter of due process, that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail.

This remains the universal rule today. See, *e.g.*, *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (rejecting application of collateral estoppel where "the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence"); *SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999) ("when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate"); see also 18 MOORE'S FEDERAL PRACTICE § 132.03[2][g] (3d ed. 1998).

B. The Generalized Phase I Findings Fail To Satisfy The Constitutional Prerequisites For Preclusion.

The Florida Supreme Court's ruling that the Phase I jury findings "will have res judicata effect" in the individual trials brought by former class members squarely conflicts with the foregoing constitutional rule.

1. During the year-long Phase I trial respondents referred to innumerable alleged acts and omissions by multiple companies over at least half a century relating to varied aspects of the design, manufacture, and marketing of cigarettes. Respondents presented scattered incidents of allegedly fraudulent or misleading statements and omissions going back to the 1930s, even though no single class member possibly could have heard or relied on all of them, and even though many class members began smoking long after, or

quit smoking long before, the events occurred. Indeed, the allegations about petitioners' conduct were so broad and numerous, and embraced so many different products and time periods, that the trial judge himself remarked on the inevitable difficulties of determining precisely which acts or omissions, among the "hundreds," "thousands," or even "hundreds of thousands" alleged, related to particular smokers' claims. T.35813-16.

For example, respondents purported to substantiate their negligence and product defect claims by referring to scores of different cigarette types and brands marketed at different times by different manufacturers. The evidence touched upon various cigarettes that yielded high, medium, low, or ultra low amounts of tar and nicotine; filtered and unfiltered cigarettes; cigarettes with and without ventilation holes (pores designed to dilute cigarette smoke) placed at different distances from the tip; cigarettes with and without nicotine; cigarettes containing different flavors, ingredients, and leaf blends; cigarettes processed with ammonia compounds or containing particular tar-to-nicotine ratios; and brands advertised with myriad different slogans and images. *E.g.*, T.25479-519; T.25537-644; T.27574-764; see also Engle Florida Class Mem. of Law in Opp. To Mot. For Directed Verdict on the Issue of Strict Liability 3 (Feb. 4, 2000) (acknowledging diversity of allegations presented in Phase I).[7]

2. Given this sprawling proceeding, petitioners proposed the use of a detailed verdict form that would have required

[7] Respondents' concealment claims were premised on similarly disparate allegations, including, for example, that petitioners failed to disclose (1) information about whether smoking causes disease; (2) information that smokers of light cigarettes "compensated" by inhaling more deeply or smoking more cigarettes; and (3) information about how certain cigarettes were allegedly designed to make them more addictive. See Plaintiffs' Consolidated Resp. to Motions for Directed Verdict on Behalf of the Council for Tobacco Research 25-26 (Mar. 14, 2000).

the jury to return specific findings identifying the particular information that was concealed and the specific acts and products, if any, that were found to be negligent or defective. Certain Defendants' Objections To The Court's Final Verdict Form For Phase I (June 21, 1999). The trial court rejected petitioners' position. As a result, the jury's findings provide no clue as to which of respondents' numerous and disparate assertions the jury accepted or rejected.

As to product defect, for instance, the jury found simply that "all of the defendants sold or supplied cigarettes that were defective," without revealing either the nature of the defect or which of the many cigarette models sold at different times were defective. As to negligence, the jury found merely that "all of the defendants were negligent." This finding is a cipher; no one can say which of the acts or omissions presented at trial the jury actually found to constitute negligence. The findings on concealment are equally cryptic. The jury concluded that petitioners "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." App., *infra*, 44a. This finding is entirely silent as to what items of information or material facts, among the great variety alleged by respondents, were concealed or omitted. *Id.* at 9a-10a.

3. The highly generalized and decidedly ambiguous nature of these findings prevents any other jury from applying them consistent with due process. There simply is no way to identify the actual conduct underlying the Phase I findings or to link that unidentified conduct to the specific claims asserted by any individual plaintiff. For instance, a plaintiff's injury is not caused by negligence in the abstract, but rather by a specific act that a jury finds to have been wrongful. But the Phase I negligence finding points to no such act. Thus, plaintiffs in the follow-on cases will ask judges and juries to indulge in a wholly speculative, but purportedly irrebuttable,

presumption that the generalized findings cover the specific facts and legal theories on which their claims are based. Allowing this shortcut would relieve plaintiffs from establishing certain elements of their claims, without assurance that those elements were resolved by the earlier jury. If left uncorrected, therefore, the preclusion ruling exposes petitioners to liability for conduct that *no* jury actually found wrongful.

Consider, by way of example, a former class member who brings a negligence action against one of the petitioners. Instead of attempting to prove that the conduct relevant to his particular experiences – the placement of ventilation holes on the brand of cigarettes that he smoked, for instance – evinced a lack of reasonable care, the plaintiff simply asserts that the Phase I findings preclusively establish the defendant's negligence. But, as described above, the Phase I jury's generalized conclusion that petitioners "were negligent" cannot be decoded to reveal a determination that any particular defendant was negligent in this particular way. A court could do no more than *guess* that the finding covered the placement of ventilation holes (or any other conduct relevant to the experiences of this individual plaintiff). As this example shows, therefore, applying the abstract Phase I findings to concrete cases necessarily produces verdicts that cannot be said to resolve the elements of any individual's claim.

Accordingly, the present case is paradigmatically one in which "several distinct matters" were litigated, "upon one or more of which the judgment may have passed," but the jury's verdict gives no indication "upon which the judgment was rendered." *Place*, 94 U.S. at 608. Because the first jury's findings cannot be linked to any identifiable evidence or allegations, there is no way even to infer whether that jury adopted any given basis for its liability-related findings that would be applicable to an individual plaintiff in a follow-on case. Cf. *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 499 (1931) (holding that multiple juries may decide aspects of a single claim only where the issues are "so

distinct and separable" that they can be tried without "confusion and uncertainty, which would amount to a denial of a fair trial"). The Florida Supreme Court's ruling nevertheless gives preclusive effect to those generalized determinations. App., *infra*, 31a. Four hundred years of precedent stand opposed to that result. The Due Process Clause forbids state courts from sacrificing such deeply rooted and fundamental protections at the altar of pragmatism.

C. The Sweeping Consequences Of The Preclusion Ruling Warrant Immediate Review.

Certiorari is warranted because the Florida Supreme Court's preclusion ruling violates this Court's precedents. S. CT. R. 10(c). The need for review is further demonstrated by the number of cases directly affected by the decision below, the waste of resources that would occur if review is deferred, and the potential impact of this case on other large class actions. *E.g.*, *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (certiorari granted "in light of the significant number of pending cases" affected).

The preclusion ruling will be invoked by every former class member filing a claim against petitioners. Indeed, that ruling promises to serve as a catalyst for such litigation, creating incentives for individual suits that otherwise would have been absent. This effect is already being felt, as plaintiffs' lawyers have begun blanketing Florida with solicitations, telling prospective litigants that the scales are now tipped decidedly in their favor. See, *e.g.*, http://www.florida tobaccoattorney.com ("The Florida Supreme Court has made certain findings of fact and law that, in individual lawsuits, could place Florida smokers at a distinct advantage – and Big Tobacco at a distinct disadvantage.").[8]

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[8] This "disadvantage" is illustrated by complaints that have already been filed, which invoke the Florida Supreme Court's preclusion ruling as conclusively establishing that *any* activity relating to the design, manu-

Because the preclusion ruling will both spur and set the terms for these suits, this Court should resolve the significant constitutional issues raised by that ruling now, for the benefit of litigants and courts alike. Unless this Court acts, petitioners face a great many artificial and unfair new suits, in which conventional modes of proof are likely to be significantly distorted. In theory, the Court might postpone consideration of the due process question while these cases wend their way through the courts. But that would entail years of delay and expense, burdening petitioners and the state and federal courts in Florida with suits all predicated on the same unconstitutional ruling. Under these circumstances, where the Florida Supreme Court's preclusion ruling cannot be applied consistent with due process, immediate review is both necessary and efficient.

Finally, the due process issues raised by this case are significant not just in this litigation, but also to federal and state courts throughout the country, which often confront similar questions regarding the allowable procedures for trying mass tort class actions involving a wide array of products. In response to the substantial manageability challenges posed by

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facture, or marketing of *any* cigarettes was tortious. The complaints assert that plaintiffs can recover damages merely by proving that smoking caused their illness. *E.g.*, Compl. For Damages By Intervenors Pasquale Caprio et al. ¶¶ 30, 34-38, 43-48, 53-58, 64-67, *Engle* v. *R.J. Reynolds Tobacco Co.*, No. 94-08273 (Fla. 11th Cir. Ct. Mar. 7, 2007); *Swindell* v. *R.J. Reynolds Tobacco Co.*, No. 07-1171 (Fla. 8th Cir. Ct. Mar. 19, 2007) Compl. ¶¶ 28-40; see also http://www.suebigtobacco.net/knowyourrights.php ("Now those harmed by cigarettes need only prove that smoking caused their own illness in order to recover damages."). The lawyers representing these plaintiffs have asserted that they "collectively represent thousands of other similarly situated Class Members," on whose behalf they state an intention to file similar suits within the period allowed by the Florida Supreme Court. Mot. To Intervene to Assert Claims for Damages and Seek Distribution from Class Fund at 4, *Engle* v. *R.J. Reynolds Tobacco Co.*, No. 94-08273 (Fla. 11th Cir. Ct. Mar. 7, 2007).

such cases, trial courts have experimented with novel procedural devices. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990). So too here, the Florida Supreme Court chose to elevate such "pragmatic" considerations above fairness, applying preclusion in a way that courts (including this one) have long disapproved. In light of the proliferation of mass tort class actions, and the unconstitutional litigation that will be spawned by this case itself, this Court's guidance is needed.

II. THE JUDGMENT BELOW UNDERMINES FEDERAL PREEMPTION AND REFLECTS THE WIDESPREAD CONFUSION CAUSED BY THIS COURT'S DECISION IN *CIPOLLONE*.

In the 15 years since this Court's seminal but fractured preemption decision in *Cipollone*, plaintiffs have adopted various tactics in seeking to evade and erode that case's holding, fulfilling Justice Scalia's prophecy that the questions it raised "will fill the lawbooks for years to come." *Cipollone*, 505 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). One of those tactics was on display in this case: respondents were allowed to advance claims functionally identical to those held preempted in *Cipollone*, merely by characterizing those claims as involving "fraud" or other traditional causes of action such as negligence. This case thus presents this Court with an opportunity to provide much-needed guidance about the scope of federal preemption in this important context and resolve a significant and recurring issue that has divided the lower courts.

A. Respondents' Claims Are Functionally Equivalent To Those Held Preempted In *Cipollone*.

In the Labeling Act, Congress prescribed the manner and content of manufacturers' warnings of smoking risks, and, to

maintain national uniformity, expressly barred the States from imposing any "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion of any cigarettes" labeled in accordance with federal law. 15 U.S.C. § 1334(b). (This preemption provision took effect on July 1, 1969. See Pub. L. 91-222, § 3.) In *Cipollone*, this Court held that the Labeling Act preempts state requirements that take the form of common-law duties imposed through private damages actions. 505 U.S. at 522. To determine whether a claim is preempted, courts must "ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health * * * imposed under State law with respect to * * * advertising or promotion.'" *Id.* at 524.

1. Applying this rule, *Cipollone* held that the Act preempts claims that "post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* Nevertheless, one of respondents' major themes in this case was that petitioners concealed from smokers information about the health risks of smoking. Throughout Phases I and II-A, respondents asserted that petitioners' inaction left smokers unaware of those risks. For example, during Phase I, one of respondents' experts testified that the cigarette manufacturers knew about "the health risks and addictive qualities of tobacco" but had not disclosed the information to the public" even by the early 1990s. T.13477-78. Other witnesses testified that petitioners failed to warn smokers that nicotine was addictive (T.12020-27; T.13479-80) and that the public was not aware of the health risks of smoking (T.18708-719), or the chemicals found in cigarette smoke (T.18716-17), and particular design features of certain cigarette types (T.16400-01). Respondents' counsel also was allowed to cross-examine petitioners' witnesses as to whether smokers had sufficient health-related information about smoking. *E.g.*, T.27957-58; T.28882-89; T.29261-67. At the end of Phase I, the jury found that petitioners "failed to dis-

close a material fact concerning the health effects or addictive nature of smoking cigarettes." App., *infra*, 7a.

Similarly, the individual plaintiffs testified during Phase II-A about their lack of knowledge of the dangers of smoking, despite Congress's pronouncement that "the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes." 15 U.S.C. § 1331(1). Farnan, for instance, testified that she did not know "how many carcinogens were contained in cigarette smoke," or that ammonia was used in cigarettes, or how nicotine affects the brain. T.40247-51. Relying on this and similar evidence, respondents contended that petitioners should have provided the public with additional health information about smoking beyond that contained in the federally mandated warning labels.

This claim, and the jury findings made in response to it, are invalid under the Labeling Act. Indeed, the Florida courts did here just what *Cipollone* prohibits: They imposed a requirement on petitioners to make public disclosures with regard to smoking and health that go beyond the warning statements prescribed by Congress. Such a requirement is inconsistent with a basic purpose of the Labeling Act – to ensure that cigarette manufacturers' warning requirements remain uniform from State to State. See 15 U.S.C. § 1331.

2. A second crucial aspect of respondents' case was that petitioners' marketing activities allegedly undermined or "neutralized" the federal warning labels, leading class members to believe that smoking was less hazardous than those labels declared. During Phase I, for example, one of respondents' experts testified that the use of "healthy and vigorous" people in tobacco advertising minimized the impact of the warnings on smokers and potential smokers, including minors. T.17265; see also T.11377-78; T.17210. Respondents' counsel drove the point home by arguing that the message

conveyed by cigarette advertising was: "Don't listen to the Surgeon General. Listen to your good friend at Philip Morris who may send you a T-shirt or a cap." T.36657.[9]

The invocation of this theory of liability continued during Phase II-A. Farnan testified that advertisements she saw in the 1960s, '70s, and '80s portrayed smoking as safe and healthy. She added that she had never seen a cigarette ad in which the models were "infirm or disabled in any way." T.42242. Reinforcing the point, an expert opined that "the advertising convinced [Farnan] that cigarette smoking was safe" and that, although she may have seen the warnings, "the advertising basically convinced her that that wasn't true." T.42383-84; see also T.42398-99 (testimony that advertising "prevented [plaintiffs] from actually believing that cigarette smoking was harmful" by keeping "them in a state of conflict and controversy"). This expert also testified that advertising "played a major role" in convincing Della Vecchia to "continu[e] to smoke for an additional 20 years." T.43759-60; see also T.43769 ("I think the advertising of the light cigarettes did convey the message to Mrs. Della Vecchia that smoking those cigarettes would be safer.").

Allowing respondents to pursue this theory of liability was inconsistent with *Cipollone*. Under that decision, the Labeling Act expressly preempts claims asserting that cigarette advertising conveyed a "false impression" that cigarettes are safe, "downplay[ed] the dangers of smoking," or "negate[d] or disclaim[ed]" the federally mandated warning

[9] See also, *e.g.*, T.36436 (argument of respondents' counsel that warnings about the dangers of smoking were ignored "because there is out there this powerful $5 billion a year spent on advertising and promotion, it's like whistling in the wind"). Relatedly, respondents launched frequent attacks on cigarette advertising as "youth marketing" (*e.g.*, T.10480; T.10915-16; T.11376-77; T.13453; T.15882-87; T.16871-81; T.16900; T.17131-54; T.17263-65), even though such attacks are preempted under *Cipollone* and *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001).

labels. 505 U.S. at 527-28. Such "neutralization" claims are "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527. As the Court explained, this theory is the flip-side of a failure-to-warn claim: Just as state courts may not impose liability based on manufacturers' failure to supplement or amplify the warning labels, they may not impose liability based on statements that allegedly dilute those labels. *Id.* (citing 1964 FTC regulations recognizing "the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements").

B. This Court's Review Is Needed To Resolve The Conflict As To Whether Characterizing Failure-To-Warn And Neutralization Claims As Fraudulent Conduct Claims Defeats Preemption.

1. In an effort to circumvent *Cipollone*, respondents characterized the claims described above as attacking "fraudulent concealment," "misrepresentation," or "negligence." The trial court ruled that the incantation of these words sufficed to defeat petitioners' preemption defense. "[T]he record of the trial reflects that the plaintiffs[']' presentation opted for evidence of a 'duty not to deceive' which goes directly to the fraud and conspiracy exception under *Cipollone*, rather than the 'failure to warn' preemption element." App., *infra*, 139a. The court invoked the *Cipollone* plurality's suggestion that some fraudulent misrepresentation claims are predicated on a general "duty not to deceive" and thus are not preempted. 505 U.S. at 528-29.[10] On appeal, the

[10] It was also on this basis that the trial court rejected petitioners' proposed jury instruction, which would have made clear that liability could not be premised on any failure to provide additional information or any neutralization of the federally mandated warnings through advertising or promotion. R. 214: 49274. Instead, the court gave an instruction that said nothing about neutralization and incorrectly told the jury that "fed-

Florida Supreme Court and the Court of Appeal allowed this understanding of federal law to stand without comment.

In so doing, however, the Florida courts deepened a division in the lower courts, placing themselves in conflict with the Fifth and Eleventh Circuits and with two other state supreme courts. These courts have held that plaintiffs cannot avoid preemption by recharacterizing failure-to-warn and neutralization claims as fraud claims. The Texas Supreme Court thus has held that a smoker's claims were preempted where they were "based on the allegation that [a tobacco company] should have provided different warnings or warnings in addition to those mandated by the 1969 Act or that it otherwise concealed the dangers of smoking." *Am. Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 439 (Tex. 1997). The fact that the claims were not expressly labeled "failure to warn" did not change the result; rather, the court held that "negligent testing" and "fraudulent concealment" claims were preempted because they were all premised on the manufacturer's "failure to disclose information regarding the dangers of cigarettes." *Id.* at 439-40. The Alabama Supreme Court reached the same conclusion, holding that failure-to-warn claims, even if labeled as "fraudulent suppression" claims, are "clearly" preempted by federal law. *Cantley* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996).

Similarly, the Fifth Circuit recently rejected efforts to avoid preemption by recasting a claim of failure to warn as fraudulent concealment. See *Brown* v. *Brown & Williamson*

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eral law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70. This instruction permitted respondents' failure-to-warn and neutralization claims to escape preemption so long as they were labeled as "fraud" or "misrepresentation" claims or packaged as part of a strict liability, negligence, or express warranty claim. In dicta, the Florida Supreme Court echoed this flawed understanding of Labeling Act preemption. App., *infra*, 38a.

Tobacco Corp., 479 F.3d 383 (5th Cir. 2007). The court observed that "most courts have held that any state law claim that would require additional communication between companies and consumers is pre-empted by the Labeling Act." *Id.* at 393. Such a claim – even if described in terms of concealment – "relies, by its nature, on an unfulfilled duty to disclose additional information" and thus is preempted. *Id.* at 394; see also *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *Lacey* v. *Lorillard Tobacco Co.*, 956 F. Supp. 956, 962-64 (N.D. Ala. 1997).

The same is true of neutralization claims; since *Cipollone*, most state and federal courts have rejected plaintiffs' attempts to evade preemption by characterizing neutralization claims as false or deceptive advertising claims. In *Grinnell*, for instance, the Texas Supreme Court held that a deceptive advertising claim was preempted, finding that it was "properly characterized as a neutralization claim because [defendant] allegedly made the deceptive statements in its advertising and promotional materials with the intent of diminishing the impact of the federal warnings." 951 S.W.2d at 440. The Fifth and Eleventh Circuits agree. See *Brown*, 479 F.3d at 392 ("implied misrepresentation" claim preempted as equivalent to the neutralization claims discussed in *Cipollone*); *Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004) (reading *Cipollone* as requiring preemption of claims alleging "fraudulent suppression" and "conspiracy to fraudulently misrepresent"). These courts have recognized that they "must look beyond the descriptive label a plaintiff attaches to a claim in determining whether or not the claim is preempted." *Lacey*, 956 F. Supp. at 963.

2. The approach to Labeling Act preemption taken in this case is directly at odds with these decisions. In allowing claims to survive preemption even though they rest on a duty to disclose additional health-related information through cigarette advertising and promotion, the Florida courts cast their lot with a minority of courts that have adopted the same

reading of *Cipollone*. App., *infra*, 208a-215a (listing published decisions since *Cipollone* in which the issue has arisen). This division of authority, combined with the frequency with which this issue arises, requires the Court's attention. The conflict is particularly significant given that the Florida courts' approach to preemption is now at odds with that of the Eleventh Circuit. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (conflict between state and federal courts in the same State is a compelling reason for review).

Moreover, as the lower-court case law reveals, there remains considerable and recurring confusion about how to apply the Labeling Act in this important context. That is not altogether surprising. *Cipollone* was a splintered decision, and *five* of the Justices who participated in that case rejected the plurality's distinction between failure-to-warn claims and fraud claims.[11] The plurality itself admitted that its position lacked "theoretical elegance." 505 U.S. at 529 n.27. This led Justice Blackmun to anticipate the "difficulty lower courts will encounter in attempting to implement today's decision." *Id.* at 543-44; see, *e.g.*, *Whiteley* v. *Philip Morris Inc.*, 117 Cal. App. 4th 635, 670 (1st Dist. 2004) (under *Cipollone* "[l]ine drawing is difficult as each side of the continuum has the capacity to swallow the other"); *Good* v. *Altria Group, Inc.*, 436 F. Supp. 2d 132, 142 (D. Maine 2006) ("courts remain divided about what [*Cipollone*] means and how to apply it"). Only this Court can put an end to this accumulating difficulty, which arises in most cases brought by smokers, by making clear that claims attacking a failure to add to the federally mandated warnings are preempted, regardless of the name given to those claims.

That certainly is the better reading of the Labeling Act and of *Cipollone*. What matters under the Act is the substan-

[11] See 505 U.S. at 543 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 553 (Scalia, J., concurring in the judgment in part and dissenting in part).

tive requirement the claim seeks to impose. And the suggestion that any claim, regardless of its substance, containing an assertion of "fraud" survives preemption is inconsistent with *Cipollone*'s recognition that the Labeling Act does not compartmentalize preemption into "any familiar subdivision of common-law claims." 505 U.S. at 523. Indeed, *Cipollone* expressly held that one of the plaintiff's claims was preempted even though it involved a theory of "fraudulent misrepresentation." *Id.* at 527-28. This makes sense; smokers should not be allowed to make an end-run around the Labeling Act simply by altering the names given to their claims. Cf. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) (rejecting attempts to re-label claims to evade preemption).

It is true that the *Cipollone* plurality stated that certain fraud claims "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation – the duty not to deceive," and on that basis escape preemption. 505 U.S. at 528-29. In context, however, this aspect of the plurality opinion is focused on claims alleging "fraud by intentional misstatement," that is, claims challenging *affirmative* "false statements of material fact." *Id.* By contrast, the plurality stated that fraudulent *concealment* claims escape preemption only "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion" – as in a disclosure to a public agency. *Id.* at 528. Had the plurality believed that concealment claims avoid preemption simply because – like affirmative fraud claims – they rest on a general duty not to deceive, this caveat about alternative channels would have been wholly unnecessary.[12]

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[12] Any effort by respondents to evade preemption by arguing that their concealment claims did not involve "advertising or promotion" could have been upheld only by exacerbating an existing and acknowledged circuit split. Compare *Brown*, 479 F.3d 393-95; *Spain*, 363 F.3d at 1197; and *Cantley*, 681 So. 2d at 1061 (any claim requiring additional commu-

C. The State Appellate Courts' Failure To Address The Preemption Issue Does Not Render This Case Unworthy Of Review.

In addition to the "importance of the questions presented and conflicting views in the courts of appeals and the district courts," *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964), certiorari is warranted here in light of the manifest disregard that the Florida courts showed for federal preemption. Confronted with petitioners' preemption arguments, the trial judge remarked that the "whole concept of *Cipollone* is terrible and wrong" (T.27878), which makes "truth and justice impossible," and declared that "I have to figure out how to get around it" (T.16621-22). On appeal, both the Florida Supreme Court and the Court of Appeal remained silent in the face of repeated pleas that the trial court's preemption errors had to be corrected. Thus, despite multiple opportunities to act and without any explanation, those courts acquiesced in the subversion of controlling federal law and in the rejection of contrary authority from state and federal courts.

Such disregard of both federal law and proper appellate procedure only reinforces the need for this Court's intervention. Had the Florida Supreme Court expressly addressed and rejected petitioners' preemption claims, the conflict between its decision and the decisions of this and other courts would have been obvious. Review is no less appropriate merely because that court abdicated its responsibilities by affirming judgments contrary to the federal Constitution and statutes without addressing those claims. Few things could be more destabilizing for the rule of law, and for the supremacy of federal law, than for state courts to be able to disregard this Court's pronouncements – and simultaneously

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nications with the public is preempted); with *Rivera* v. *Philip Morris, Inc.*, 395 F.3d 1142, 1148 (9th Cir. 2005) (interpreting "advertising and promotion" narrowly to avoid preempting claims based on omissions from channels such as media reports and public service announcements).

evade this Court's review – simply by refusing to consider federal issues presented to them.

Indeed, because petitioners are entitled to have their federal claims actually considered, this Court should, at a minimum, grant certiorari, vacate the judgment below, and remand the case for consideration of the preemption issue by the Florida appellate courts. As this Court has observed, a GVR "assists the court below by flagging a particular issue that it does not appear to have fully considered" and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996); see also *Youngblood* v. *West Virginia*, 126 S. Ct. 2188, 2190 (2006) (using GVR where state supreme court failed to address federal issue presented to it).

Finally, the state appellate courts' unexplained refusal to enforce petitioners' federal rights did more than permit two individual plaintiffs to prevail on preempted theories of liability. By virtue of the Florida Supreme Court's flawed preclusion ruling, the stage has been set for former members of this enormous class to avail themselves of findings that were irredeemably tainted by the same preempted theories. If certiorari is not granted, the Florida courts' disregard for federal preemption will subject petitioners to adverse judgments based on those theories in all the follow-on cases to which the Florida Supreme Court has given the green light. This result requires correction by this Court *before* petitioners and courts across Florida are subjected to the burdens associated with a long series of inherently defective trials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
MARK A. PERRY
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

STUART ALTSCHULER
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

JOSEPH PATRICK ARCHIE
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104
(215) 994 4000

DAVID S. EGGERT
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Petitioner Philip Morris USA Inc.

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
BRIAN M. WILLEN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer, Brown, Rowe & Maw LLP
1909 K St., N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner Philip Morris USA Inc.

DONALD B. AYER
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

CHARLES R.A. MORSE
Jones Day
222 E. 41st Street
New York, NY 10017
(212) 326-7847

Counsel for Petitioner R.J. Reynolds Tobacco Co.

DAVID L. ROSS
ELLIOT H. SCHERKER
Greenberg Traurig
1221 Brickell Ave.
Miami, FL 33131
(305) 579-0500

Counsel for Petitioner Lorillard Tobacco Co.

RICHARD A. SCHNEIDER
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 572-4600

Counsel for Petitioner Brown & Williamson Holdings, Inc.

AARON H. MARKS
LEONARD A. FEIWUS
Kasowitz Benson Torres & Friedman
1633 Broadway, 22nd Floor
New York, NY 10019
(212) 506-1700

KELLY ANNE LUTHER
Clark Silverglate & Campbell, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
(305) 377-0700

Counsel for Petitioner Liggett Group LLC

JAMES A. GOOLD
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel for Petitioner The Tobacco Institute, Inc.

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